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Nos. 642, 680, 691, 813, 814, 815.

IN THE

Supreme Court of the United States

October Term, 1966.

BALTIMORE AND OHIO RAILROAD COMPANY,
DELAWARE AND HUDSON RAILROAD CORPORATION,
ERIE-LACKAWANNA RAILROAD COMPANY,
CITY OF SCRANTON,
MILTON J. SHAPP,
CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY,

Appellants,

against

UNITED STATES OF AMERICA, et al.,

Appellees.

On Appeal from the United States District Court for the Southern District of New York.

BRIEF FOR APPELLEE, CITY OF PHILADELPHIA.

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COUNTER-STATEMENT OF QUESTIONS PRESENTED.

1. Whether the Three-Judge District Court below abused its judicial discretion in denying interlocutory relief.

2. Whether the findings and decision of the Interstate Commerce Commission in authorizing the Penn-Central merger had a rational basis and were supported by reliable, probative and substantial evidence.

COUNTER-STATEMENT OF THE CASE.

A. History of the Case.

This is an appeal from an Order dated October 4, 1966, of a three-Judge United States District Court for the Southern District of New York (one Judge dissenting) denying requests for an Interlocutory Injunction enjoining the immediate consummation of a merger of the New York Central Railroad Company and the Pennsylvania Railroad Company pursuant to Interstate Commerce Commission Orders and Reports dated April 6, 1966 and September 16, 1966, respectively.

On October 18, 1966, this Court stayed the Commission's Order pending disposition of the appeals from the District Court's decision.

The Commission's Order authorizing the merger was the culmination of a controversy involving all of the principal railroads in the northeastern United States which presently are divided into four major railroad systems. These are the Pennsylvania; the New York Central, the Chesapeake and Ohio-Baltimore and Ohio and their affiliates; and the Norfolk and Western Railway. In addition, there are a number of other railroads not part of the four systems, viz., Erie-Lackawanna, Delaware and Hudson, Boston and Maine, New Haven, Central Railroad Company of New Jersey, Reading, and Western Maryland Railway Company.

The Penn-Central merger application filed on March 9, 1962, under Section 5(2) of the Interstate Commerce Act 49 U. S. C. §5(2), was the forerunner of two additional merger proposals before the Interstate Commerce Commission: one, the Norfolk and Western Inclusion case (Interstate Commerce Commission Finance Docket No. 21510), wherein Erie-Lackawanna, Delaware & Hudson and Boston & Maine seek inclusion in either the Norfolk and Western

system or in the merged Penn-Central system, alleging that they cannot survive as independents if Penn-Central is merged; the other, the Norfolk and Western-Chesapeake and Ohio merger (Interstate Commerce Commission Finance Docket No. 23832), wherein these two carriers seek authority to merge into a separate system allegedly competitively equal in size to the proposed Penn-Central system.

Subsequent to the initiation of the instant merger proposal and after extensive hearings, the Commission authorized and approved the merger in its Report and Order dated April 6, 1966, subject however to certain traffic and financial conditions imposed for the protection of labor and other carriers. (Finance Docket No. 21989; 327 I. C. C. 475); (No. 691, Appendix A-522).

The conditions directed the Penn-Central to preserve present practices and patterns (both as to routes of movement and volume) of traffic for which Erie-Lackawanna, Delaware and Hudson and Boston and Maine compete with Penn-Central, and also required the payment of an indemnity by the merged company to the three carriers in the event that the merger should result, despite the traffic conditions, in diversion of traffic that changed the relative freight revenues of the three carriers as compared with those of Penn-Central. Specific procedures were also provided for the administration and enforcement of the conditions.

Thereafter, upon petition of various parties, the Commission deferred the effective date of the merger from May 31 to September 30, 1966, in order to give further consideration to the numerous Petitions for Reconsideration filed with it. Then, on August 29, 1966, the Commission declined to postpone the September 30, 1966 date; whereupon the three separate suits below, more fully described hereinafter, were initiated and subsequently consolidated.

On September 19, 1966, the Commission served all parties its Report on Reconsideration. In said Report, the Commission reaffirmed September 30, 1966 as the date for the

consummation of the merger; but also found that the proceedings before it should be reopened for further consideration, with further hearing, to determine whether and in what respects the aforesaid protective traffic and financial conditions should be modified including modification to prevent so-called "manipulations" of the indemnity conditions; as described in the majority opinion of the Court below (No. 642, J. S. A-12, 13, 14), and also whether a provision should be included to compensate the protected carriers from a loss in capital values arising from diversion of revenues not met by indemnity provisions.

The Commission, in its said Report on Reconsideration, found that great public benefits would flow from the merger and directed that consummation would, "constitute irrevocable assent on the part of the applicants to any modification resulting from the further consideration herein described and ordered and which are found to be just and reasonable, as well as irrevocable agreement by the applicants to comply fully with the conditions as modified" except that "it should be clearly understood that the consummation of the merger will not foreclose or limit court review of any decision the Commission may make in regard to the capital indemnity issue." (No. 642, J. S. B-43.)

During the pendency of the further hearing and reconsideration before the Commission, all traffic conditions in the initial report were to remain in effect, but the indemnity provisions were rescinded. The Commission further directed that "any provision which may be decided upon for the payment of indemnities will be made applicable retroactively to the date the merger is consummated." (No. 642, J. S. B-44.)

Following the August 29, 1966 Order of the Commission declining to postpone the September 30, 1966 effective date of merger, the various plaintiffs below, as aforesaid, instituted separate actions seeking to enjoin the Commission Orders authorizing the consummation of the merger on September 30, 1966; the first such action being initiated on September 8, 1966. Various parties, including the City of

Philadelphia, sought and were granted intervention and all of the actions were consolidated for hearing. On September 21, 1966, argument was heard by the District Court of Three Judges below which had been convened to determine the cases pursuant to 28 U. S. C. §§2325 and 2284.

The District Court entered an Order temporarily restraining consummation of the merger, pending that Court's deliberation and determination of the motions for interlocutory injunctive relief.

Thereafter, on October 4, 1966, the motions for interlocutory injunction were denied, with the proviso that the temporary restraining Order previously entered, remain in effect through October 7, 1966, and if application for a stay of consummation shall have been filed with the Clerk of the Supreme Court before the close of business on that day, until determination thereof by the Circuit Justice or other direction by him or by the Supreme Court. On October 18, 1966, this Court stayed the Commission's Order pending disposition of this Appeal.

B. Status of the City of Philadelphia In This Proceeding.

The City of Philadelphia was a party to the proceedings before the Interstate Commerce Commission, and initially took a position in opposition to the merger. Subsequently, after evaluating the anticipated effects and the probable results of the proposed merger; and on the basis of the evidence adduced at the hearings before the Commission, the City of Philadelphia formally withdrew its opposition as noted in the decision of the Commission decided April 6, 1966, which was served on April 27, 1966.

At the oral argument held before the Court below on September 21, 1966, the City of Philadelphia orally moved for leave to intervene as a party defendant pursuant to Rule 24 of the Rules of Civil Procedure and based upon the pro-

visions of the Judicial Code set forth in 28 U. S. C. §2323, wherein it is provided, inter alia, that communities interested in the controversy before the Commission, or in any action commenced may intervene in said action at any time after commencement thereof. Leave to intervene as a party defendant therein was granted by the Court below.

C. Position of the City of Philadelphia.

The City of Philadelphia, as of the 1960 U. S. Census of Population, had a population of 2,002,512 and comprised 16.69% of the total population of the State of Pennsylvania. As a Standard Metropolitan Statistical Area comprising the City itself and the outlying areas surrounding it, Philadelphia is the world's twelfth largest community having a metropolitan area population of 4,342,897. It is the fourth largest City and Standard Metropolitan Statistical Area in the United States.

The City of Philadelphia however, is concerned not only with increasing its own economic health and growth; but also that of its greater metropolitan area and the surrounding communities. Its leadership in the field of mass rail transportation has long been recognized throughout the country.

Because of the significance of mass transportation to the City of Philadelphia, it has a distinct and material interest in the maintenance, enchancement and improvement of efficient and reliable mass rail transportation services and facilities so that the ever-increasing flow of persons and goods to and from Philadelphia will be adequately and better served.

On behalf of these interests, the City of Philadelphia, from its considerations of the various factors involved, has concluded that the proposed Penn-Central merger would be beneficial to the public interest in that it would result in better and improved rail service and would provide ad-

ditional benefits to the Port of Philadelphia, as well as affording other economic benefits to the greater Philadelphia metropolitan area and its population.

Accordingly, the City of Philadelphia continues to support the proposed merger and the decision of the Interstate Commerce Commission and the Court below with respect to the consummation thereof, and therefore, respectfully submits that the Judgment and Order of the Court below should be affirmed and the merger consummated without further delay.

ARGUMENT.

A. There Has Been No Showing That the Decision of the Three-Judge District Court Below in Denying Interlocutory Relief Constituted an Abuse of Discretion.

The majority opinion of the District Court below held that the exercise of its discretion was governed by the four criteria set forth by the Court of Appeals of the District of Columbia in *Virginia Petroleum Jobbers Ass'n v. F. P. C.*, 259 F. 2d 921 (1958), approved in *Eastern Air Lines, Inc. v. C. A. B.*, 261 F. 2d 830 (1958). These four standards cited by the Court below (No. 642, J. S. A-16, 17), and resolved against the complaining carriers are;

(1) Whether the petitioner has made "a strong showing that it is likely to prevail on the merits";

(2) Whether the petitioner has shown that without interim relief it will have been irreparably injured if it ultimately prevails;

(3) Whether the issuance of the stay would substantially harm the parties opposing it if they ultimately prevail; and

(4) Whether the public interest will have been adversely affected by a stay if the validity of the order is ultimately sustained.

It is well settled that "an order of a court of three judges denying an interlocutory injunction will not be disturbed on appeal unless plainly the result of an improvident exercise of judicial discretion." *United Fuel Gas Co. v. Public Service Comm.*, 278 U. S. 322, 326 (1928).

It is submitted that there has been no showing of an "improvident exercise of judicial discretion" by the Court below. In fact, none of the carriers who are plaintiffs or

intervenors and almost none of the other intervenors question the ultimate desirability of the merger.

With respect to the first two criteria, the appellants could not, did not and have not now demonstrated that they are likely to prevail on the merits, nor that they would suffer irreparable harm without interim relief if they ultimately do prevail. It is also submitted that the findings of the Commission, underlying its decision authorizing the merger in the public interest under Section 5(2) of the Interstate Commerce Act, 49 U. S. C. §5(2), are supported by reliable, probative and substantial evidence. These findings are hereinafter more fully discussed.

Moreover, the affected carriers are to be indemnified for any revenue diminution caused by the merger by reason of diversion of traffic. Additionally, the special traffic conditions, designed to preserve the pre-merger status quo, will further serve to prevent injury to said carriers.

Further, appellants cannot show that they are likely to prevail on the merits since the indemnification provisions have not yet been determined by the Commission; nor is it known whether appellants will ever attack them. As suggested in the briefs to the Court below, if the traffic conditions imposed by the Commission are successful in maintaining the status quo and the revenues of the three railroads (Erie-Lackawanna; Delaware and Hudson; and Boston and Maine) remain relatively as high or higher than those of the merged Penn-Central system, no indemnification would be due, and there would be no need for the Court to review whether the Commission's formula was just and reasonable. The Court below, in resolving these criteria against appellants, further stated (No. 642, J. S. A-17, 18):

> "We also see no prospect that C. & E. I. or any other non-protected carrier would be able to persuade a reviewing court to set aside for lack of substantial evidence the findings of failure to show serious diversion arising from the merger itself, as distinguished from the

new problems allegedly engendered by the indemnity formula which are yet to be ruled upon."

Appellants further contended that a lack of hearing on the protective conditions was improper. This contention no longer has validity because all interested parties are now to be fully heard by the Interstate Commerce Commission. Indeed, hearings commenced on October 31, 1966, as expressly allowed by this Court, and the issue relating to capital indemnity provisions has already been submitted to the Commission.

Appellants also contended that Commission Order is defective for failure to comply with the Interstate Commerce Act, 49 U. S. C. §5(2)(b), which requires the Commission to "enter an order approving and authorizing such transactions, upon the terms and conditions, and with the modifications, so found to be just and reasonable." Appellants allege that by leaving these terms and conditions open for future determination in important particulars, the Commission did not do what Congress required before it can lawfully approve a railroad merger.

To this contention, the Court below aptly responded (No. 642, J. S. A-22, 23):

> "Section 5(9) expressly provides that the Commission may 'from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7) of this section, as it may deem necessary or appropriate.' Moreover, orders under §5(2) have regularly retained jurisdiction, as did that initially issued here, 'for the purpose of making such further order or orders herein as may be necessary or appropriate, in addition to those orders under jurisdiction expressly retained in said report of the Commission and to those orders which may be issued under section 5(9) of the Interstate Commerce Act.' The validity of the Commission's authorizing carriers to

take action while retaining jurisdiction to impose conditions in the future is strongly sustained by United States v. Rock Island Motor Transit Co., 340 U. S. 419 (1951); American Trucking Ass'ns, Inc. v. United States, 355 U. S. 141, 154 (1957); and American Trucking Ass'ns, Inc. v. Frisco Trans. Co., 358 U. S. 133 (1958)."

The Court below further reasoned (No. 642, J. S. A-24),

"If the Interstate Commerce Commission had initially prescribed only the special traffic conditions and reserved jurisdiction to reconsider these with a view to strengthening them and also to imposing an indemnity, with the Transportation Company bound to accept such changed or additional conditions if it consummated the merger, we would surely not have found the order formally defective under §5(2)(b) at the suit of other carriers. Yet the only difference between such an order and what has happened is that the Commission initially prescribed financial conditions and then withdrew them for further consideration, with power to impose new conditions retroactively to the date of the merger."

Moreover, the Court below described the traffic conditions as going far beyond any in previous history and held that the affected carriers had made no showing "that would have led us to enjoin consummation of the merger if the Commission had been satisfied with the special traffic conditions in Appendix G." (No. 642, J. S. A-28.)

It is further submitted that appellants' contention that consummation would prejudice the unprotected carriers in obtaining effective judicial review of such protective financial conditions as may be imposed, is also without merit. As directed by the Commission, and recognized by the Court below and acknowledged by the applicants themselves; Penn-Central, by consummating the merger, waives

any right to review of new traffic or financial conditions to be imposed for the protection of Erie-Lackawanna, Delaware and Hudson and Boston and Maine as a result of the hearing on reconsideration, with the single exception, specified in the Commission's Report on Reconsideration, of any provision indemnifying the three roads against loss of capital values. The other contention of appellants is that review of the traffic and financial conditions resulting from reconsideration would be ineffective because appellants' only recourse would be to seek an order requiring Penn-Central to dissolve, unless it would voluntarily accept new conditions resulting from review. It is submitted however, that once conditions are imposed (and the Commission has reserved jurisdiction to do so), said conditions will constitute orders of the Interstate Commerce Commission, and will, therefore, be subject to review by the Courts (28 U. S. C. §§1336, 2284, 2321-2325), subject, of course, to the provisions of the Administrative Procedure Act, 5 U. S. C. §1001 et seq., which grants, inter alia, the reviewing court the authority to preserve status or rights pending conclusion of the review proceedings. The Court below, therefore, reasoned (No. 642, J. A. A-35),

> ". . . there is simply no support for the position that, subject to the normal limitations on judicial review of administrative action, we could not direct reconsideration of a condition as such."

Accordingly, the Court below concluded (No. 642, J. S. A-37),

> "Since all affected carriers are thus to have a further expedited hearing before the Commission with respect to protective conditions, since the Transportation Company concedes it is precluded from seeking review of any new traffic or financial conditions in favor of the three roads resulting from the reconsideration (save as to impairment of capital values), and since all roads are

assured of judicial review of the protective conditions ultimately imposed as effective as is now available, we find no sufficient basis for delaying for a year or more the public and private benefits from the merger found by the Commission and recognized by the plaintiff carriers themselves."

With respect to the third criterion, viz., whether issuance of the stay would substantially harm the parties opposing it if they ultimately prevail, it is submitted that an injunction would cause substantial harm to the Pennsylvania, the New York Central and to the public in general. The Pennsylvania and New York Central would lose an estimated $80,000,000. in annual savings expected to result from the merger. Additionally, the New Haven's endeavors to avoid liquidation would be hampered since it would not be able to proceed with its inclusion into the merged system.

As to the fourth criterion, an injunction will clearly harm the public interest.

The Commission, in its decision, citing *United States v. Lowden*, 308 U. S. 225, 230 (1939), stated that public interest

> "* * * is not a mere general reference to public welfare, but, * * * has a direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency and to appropriate provision and best use of transportation facilities." 327 I. C. C. 494 (No. 691, Appendix A-494).

Moreover, as repeatedly asserted by the Commission, it is submitted that the public interest requires prompt consummation of the proposed merger.

Likewise, in the majority opinion of the Court below, it is stated, inter alia (No. 642, J. S. A-19):

> "The third and fourth factors cited as governing the exercise of our discretion, damage to the defendants and to the public, weigh heavily against the grant of a

temporary injunction, although perhaps not quite so overwhelmingly as the defendants assert. The Commission found, with ample supporting evidence, 'that the transaction will permit more economical and efficient use of the applicants' transportation facilities' and that the resulting economies 'will redound in large part to the benefit of shippers, and thus to the general public, either through the improved service thereby made possible or lower rates.' 327 I. C. C. 491. These considerations do not lose their force because of the marked recent improvement in the applicants' earnings. By adding financial strength and eliminating the need for duplicate facilities, 'the merger will promote renovation of plant needed to enable the applicants to afford better service and thereby retain or increase traffic. Granted that the maximum $80,000,000 annual savings estimated by the applicants and found by the Commission to be attainable by the merger are not expected until the eighth year, when physical improvements will have been completed and the expense of the labor protective provisions attenuated, substantial savings are estimated at earlier dates, and any postponement of consummation will postpone for the same period all the savings and the improved service for the shipping public."

It is therefore respectfully submitted that in view of the great and widespread public benefits to be realized from the merger, there is no reasonable basis for delay in the consummation of the merger; and as so well stated by the Court below (No. 642, J. S. A-20),

"The long delay to which the applicants have already been subjected argues strongly in favor of letting them get ahead with the job, as the Commission unanimously thought, rather than against it."

B. The Findings and Decision of the Interstate Commerce Commission in Authorizing the Merger Had a Rational Basis and Were Supported by Reliable, Probative and Substantial Evidence.

It is submitted that the Commission's approval of the Penn-Central merger was founded upon its conclusions that both applicants had insufficient earnings from transportation operations, and that the merger would result in vast savings to the applicants, and in improved service to the public.

Appellants, however, suggest that the Commission did not make adequate findings on the competitive significance of the merger. To this contention, it is submitted that a great portion of the Commission's lengthy Report of April 6, 1966, deals with the aforesaid competitive effects of the merger. Moreover, it is submitted that the Court below properly held that the Commission's Report "fully complied" with the directions of the Supreme Court in *Seaboard Air Line R. Co. v. United States*, 382 U. S. 154 (1965), and in *Minneapolis & St. Louis R. Co. v. United States*, 361 U. S. 173, 186 (1959); (No. 642, J. S. A-5, 6).

Additionally, it is apparent that a basic factor in the Commission approval of the merger was the plight of the New York, New Haven & Hartford Railroad Company. In this respect the Commission finding was based upon the following rational basis: (327 I. C. C. at 522); (No. 691, Appendix A-522),

> "—Without some radical change in circumstances, even if this merger application were denied, NH would face a nearly insuperable task in bringing itself out of bankruptcy. The Transportation Company, with new routings and improved service, could undoubtedly wean substantial traffic away from NH and leave that already moribund carrier in perhaps an irretrievable situation."

Next addressing itself to Erie-Lackawanna, Delaware and Hudson and Boston and Maine, the Commission, in recognizing, considering and analyzing the evidence relating to the possible merger effect on these carriers, provided that within one year after a final denial of the petition of said carriers for inclusion in the Norfolk and Western system, they could apply for inclusion in the Penn-Central system. (327 I. C. C. at 531); (No. 691, Appendix A-531). To provide interim protection for said carriers, the Commission prescribed the aforementioned protective conditions. (327 I. C. C. 561); (No. 691, Appendix A-522). The Commission's Report on Reconsideration, as aforesaid, while retaining the traffic conditions, rescinded the indemnity provisions and reopened the proceeding for further hearing on both categories of the conditions (as well as on the issue of capital loss indemnification), providing nevertheless that any indemnity provision prescribed after further hearings will be made retroactive to the date of the merger which, when consummated, shall constitute applicants' irrevocable consent to the subsequent conditions imposed.

Moreover, as the Commission noted, in its Report on Reconsideration (No. 642, J. S. B-14),

> ". . . the task of implementing a merger of this size is so vast and complex that its competitive effects will occur only gradually. We see no basis for disagreeing with the testimony of the chairman of both E-L and D&H (a former president of New York Central) in F. D. No. 21510, that E-L would not 'be substantially and adversely affected immediately upon consummation of [the Penn-Central] merger', and that 'the effects would begin to be felt perhaps in the second year, and not in the first year.' "

Based upon this inherent delay in competitive impact, coupled with the traffic conditions and retroactive in-

demnity conditions, the Commission rationally, and thus supported by substantial evidence, concluded that sufficient interim protection would be afforded the affected carriers.

That the Commission's finding that the proposed merger will result in great savings to the applicants is supported by substantial evidence, is borne out by the Commission's comment in its Report on Reconsideration (No. 642, J. S. B-13),

> "We have found that the merger will eventually produce annual savings of at least $80 million dollars for the applicants. This benefit alone is no small factor of public interest when we consider the applicants' financial situation during the past decade and the fact that they, like the rest of American industry, are not assured of continuous operations at the 1966 level. To postpone consummation of the merger which we approved because there is at present a high level of economic activity gambles unnecessarily and unjustifiably with the future of these lines and their ability to render essential services. More important, we found that the merger would result in substantially improved service for the large shipping public served by these applicants."

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the Decision of the District Court denying an interlocutory injunction should be affirmed and that this Court permit prompt consummation of the merger.

Respectfully submitted,

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